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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 746

GENERAL MOTORS ACCEPTANCE CORPORATION,
Appellant,

vs.

COMMISSIONER OF BANKS OF THE STATE OF WISCONSIN,
Appellee

APPPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, appellant submits herewith its statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the final decree and judgment of the Supreme Court of Wisconsin entered in this cause.

Opinions Below

The first opinion of the Supreme Court of Wisconsin is reported in 258 Wis. 56, 45 N. W. 2d 83 (1950). A copy of

that opinion is attached hereto as Appendix A. The opinion of the Supreme Court of Wisconsin upon rehearing is reported in 258 Wis. 64a, 46 N. W. 2d 328 (1951). A copy is attached hereto as Appendix B.

Jurisdiction

The jurisdiction of the Supreme Court of the United States is invoked under 28 U. S. C. § 1257 (2).

1. The Supreme Court of Wisconsin affirmed a judgment against appellant on December 5, 1950. A timely petition for rehearing was denied upon its merits on February 6, 1951, with an opinion. The decree and judgment of the Supreme Court of Wisconsin, the court of last resort in the State of Wisconsin, is final. The petition for appeal was presented to the Chief Justice of the Supreme Court of Wisconsin on April 27, 1951.

2. In its petition to the court of the first instance (the Circuit Court of Dane County, Wisconsin), appellant requested judgment that Rule II of the Commissioner of Banks, promulgated under Section 218.01 of the Wisconsin Statutes, was, as applied to appellant, arbitrary, capricious, without sound basis in fact and impaired the constitutional rights and privileges of the petitioner.[1] Appellee's answer specifically denied these allegations, and in its conclusions of law and judgment, the court of the first instance specifically held that Rule II was valid and constitutional.

Errors of lower courts in Wisconsin are not brought to the attention of the Supreme Court of Wisconsin by a formal document made a part of the record. Assignments of error are presented in appellants' briefs by a statement entitled "Questions Involved". Appellant here duly pre-

[1] Other grounds for the petition, based upon state law, are, of course, not now in issue.

served its contention that Rule II as applied, violated the Fourteenth Amendment. In its first opinion, the Supreme Court of Wisconsin did not specifically refer to the constitutional questions raised by appellant. Appellant's brief upon its petition for rehearing again urged the constitutional points, in particular its contentions that appellee's Rule II promulgated under Section 218-01 of the Wisconsin Statutes, as construed by the Commissioner of Banks and the Supreme Court of Wisconsin, denied to appellant that equal protection of the laws and due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The following paragraph appears in the opinion of the Supreme Court of Wisconsin upon the denial of the petition for rehearing:

> "Upon the motion for rehearing, the petitioner, General Motors Acceptance Corporation, states that, in its decision herein, the court made no reference to a constitutional question raised upon the appeal. The petitioner contended then, and does now upon this motion, that the ruling of the Commissioner of Banks and the decision of this court result in a denial to petitioner of the equal protection of the laws and a deprivation of its property without due process of law, each of which is guaranteed by the Fourteenth Amendment to the Constitution of the United States. Although it was not specifically referred to in the opinion, the court considered this contention and deemed it to be without merit."

In view of this explicit ruling upon the Federal questions raised by appellant, further search of the record for the manner in which the Wisconsin statute and administrative rule were drawn in question becomes unnecessary. *Whitfield* v. *Ohio*, 297 U. S. 431, 435-436, 80 L. Ed. 778, 782 (1936); *Nickey* v. *Mississippi*, 292 U. S. 393, 78 L. Ed. 1323

(1934); *Charleston Federal Savings & Loan Association* v. *Alderson*, 324 U. S. 182, 89 L. Ed. 857 (1945). See also *id.*, 324 U. S. at page 186, footnote 1, and cases there cited, as to certificates of state courts.

3. This action began as a petition for a declaratory judgment under the provisions of Chapter 227 of the Wisconsin Statutes, 1945. Appellant alleged, and appellee admitted in its written answer, that the Commissioner of Banks had threatened the appellant with revocation of its license to engage in the finance business in Wisconsin. This unamended admission is binding on appellee. *Savich* v. *Hines*, 174 Wis. 181, 182 N. W. 924 (1921) and cases cited; *United States* v. *Wimbish*, 154 F. 2d 773 (C. C. A. 4th 1946); *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U. S. 315, 83 L. Ed. 195 (1938). Appellant's standing to maintain its action in this Court is thus based not upon the academic and abstract general interest of some of the appellants in *United Public Workers* v. *Mitchell*, 330 U. S. 75, 91 L. Ed. 754 (1947). General Motors Acceptance Corporation is rather in the position of those against whom a "direct threat" has been made. It is, therefore, entitled to be heard upon the merits in this Court. *United Public Workers* v. *Mitchell*, *supra*, at page 88, and cases there cited; *Connecticut Mutual Life Ins. Co.* v. *Moore*, 333 U. S. 541 at 550, 92 L. Ed. 863 at 871 (1948); *Asbury Hospital* v. *Cass County*, 326 U. S. 207, 90 L. Ed. 6 (1945). See *Kotch* v. *River Port Pilot Commissioners*, 330 U. S. 552, 91 L. Ed. 1093 (1947). Compare also *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 at 206, 92 L. Ed. 649 at 656 (1948); *Coleman* v. *Miller*, 307 U. S. 433, 443, 445, 83 L. Ed. 1385, 1391, 1392 (1939).

4. It is clear that an administrative rule, such as the one here involved, which has the force and authority of statute, is a "statute" within the meaning of 28 U. S. C. § 1257 (2). *Hamilton* v. *Regents of the University of California*, 293

U. S. 245, 79 L. Ed. 343 (1934); *Lake Erie & Western R. Co. v. State Public Utilities Commission ex rel. Cameron*, 249 U. S. 422, 424, 63 L. Ed. 684, 687 (1919); *Illinois ex rel. McCollum v. Board of Education*, 333 U. S. 203 at 206, 92 L. Ed. 649 at 656 (1948).

Question Presented[3]

In the regulation of the maximum "dealer participation" which may be paid by licensed finance companies, may the State of Wisconsin, consistent with the equal protection clause of the Fourteenth Amendment, differentiate between finance companies so as to require insurance commissions paid to an automobile dealer by an insurance company to be taken into account, as part of dealer participation permitted to be paid by a finance company, when such insurance commissions are paid by an insurance company which is so related to a finance company that the two are deemed to be "separate corporations in name only," but not to so treat insurance commissions when they are paid by an insurance company not so related to a finance company.

Statute and Administrative Rule Involved

Chapter 474, Wisconsin Session Laws, 1935, p. 748; Section 2 of Chapter 417, Wisconsin Session Laws, 1937, pp. 688, 691, and amendments thereto, presently found in Section 218.01(5)(c), Wisconsin Statutes, 1949, authorizes the Commissioner of Banks of the State of Wisconsin to "make such rules and regulations as [he] shall deem

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[3] While only the principal issue is summarized under this heading and discussed in this Statement, each assignment of error is presented, including the issue also raised below, to the effect that the administrative agency's application of the statute in excess of his statutory power constitutes a denial of due process of law.

necessary or proper for the effective administration and enforcement of this section * * *". Purportedly under this section of the Wisconsin Statutes, the Commissioner of Banks promulgated Rule II set out in Appendix C attached hereto. Appellant's challenge of this Rule, as applied, rests upon the interpretation of the Rule by the Supreme Court of Wisconsin in that court's opinions set out in Appendices A and B attached hereto.

Statement

The GM "Family"

General Motors Acceptance Corporation (called GMAC) is a New York corporation which has been licensed to do business in Wisconsin for many years by that state's Secretary of State. It is a wholly owned subsidiary of General Motors Corporation (GM), a Delaware corporation. GMAC, in turn, owns all of the capital stock of Motors Insurance Corporation (MIC), a New York insurance company which has been licensed to do business in Wisconsin since 1941 and which charges the same standard rates as any other automobile stock insurance company doing business in the state.

The Automobile Finance Business

A brief summary of the operation of the automobile finance business is necessary for an understanding of the issue presented.

In an instalment sale transaction, an automobile dealer agrees in writing with the purchaser of a new or used car that less than the full time price of the car shall be paid at the time of the delivery of the car with the balance to be paid in instalments over a period of time. The time price exceeds the cash sale price by the amount of the finance

charge. A majority of dealers sell their "time paper" to finance companies, such as GMAC, which buy the paper at a discount equal to the finance charge.

The amount of the finance charge is set primarily by competition. Out of the discount, the finance companies pay to the dealer an amount known as dealer participation or dealer reserve which payment is recognized as legitimate and, within the maximum limits, is permitted by the Rule involved here.

Cars sold on time must be insured at the buyer's expense against the casualties of fire, theft and collision. The buyer may get this insurance from whomever and wherever he wishes.

During the 1920s and early 1930s, abuses developed in the automobile finance business. One such abuse, a perversion of the normal, legitimate "dealer participation", was called the "pack". The "pack" was an unwarranted sum added by less scrupulous dealers, over and above any legitimate finance charge, and concealed from the buyer. Some finance companies cooperated with these dealers so as to permit the dealer to realize these excessive sums.

Wisconsin Legislation

In 1935 the State of Wisconsin enacted what is now Section 218.01 Wisconsin Statutes of 1949, to correct various financing abuses. Finance companies and retail automobile dealers were required to secure a license from the Commissioner of Banks (then called the Banking Commission). The abuses were to be eliminated by requiring delivery to the buyer of an itemized statement of each charge, including insurance premiums, going into the time sale transaction so that the purchaser would know precisely what he was paying for. § 218.01(6), Wis. Stats., 1949. The whole object of the act was to bring about complete disclosure of

time price factors which would effect the elimination of hidden or fraudulent charges.

The Commissioner of Banks was given the usual power to pass rules and regulations for the administration of the statute. § 218.01(5)(c). Presuming to act under this authority, the Commissioner promulgated his Rule II, which set limitations upon the amount of dealer participation which might be paid to dealers by finance companies.

With the basic purpose of this Rule appellant had and has no quarrel. The Commissioner, however, subsequently interpreted his Rule in a fashion which appellant asserted was beyond his statutory authority. The Commissioner contended that *insurance commissions* paid out of insurance premiums by insurance companies to their agents for writing insurance on cars sold on time were to be treated as a part of "dealer participation" in determining the maximum dealer participation permitted to be paid by the finance company if the insurance agent was also an automobile dealer who sold the time paper on the car in question to the finance company. Under the Commissioner's interpretation, these insurance commissions had to be added to "dealer participation" received from a finance company to determine whether the total amount which the finance company could pay the dealer exceeded the limitations established by Rule II.

The Present Action

Appellant brought the present action in the Circuit Court for Dane County, Wisconsin, praying judgment that such interpretation and application of the Rule by the Commissioner was in excess of his power and authority.

The circuit court held against appellant's contentions. Appellant appealed to the Supreme Court of Wisconsin, and

it is the action of the Wisconsin court of last resort which brings appellant to this Court. The Wisconsin court did not hold that insurance commissions are, in fact, dealer participation under the Wisconsin statute. It held, in effect, that insurance commissions are *not* dealer participation—but that because *GMAC* is so closely related to MIC, which writes insurance on some GMAC-finance cars, the Commissioner's regulation *as applied to GMAC* could be enforced against *it*. GMAC's arguments that dealer participation does not include insurance commissions, the Wisconsin court held, were "convincing" but for its conclusion that GMAC and MIC are "separate corporations in name only".

Thus by a combination of administrative and judicial interpretation, the Wisconsin statute regulating finance companies has singled out appellant (and any other finance company which the court might deem to be one and the same with an insurance company, though they are separate corporations) for regulation of a far more strict character than is imposed upon a finance company independent of any insurance company. GMAC must subtract the insurance commissions its subsidiary, MIC, pays to such of its agents who may be dealers, from the amount of dealer participation GMAC would otherwise be permitted to pay such dealers under Rule II. Finance companies who do not own (or at least are not closely affiliated with) insurance companies are subjected to no such limitation. They may pay the dealer the full dealer participation permitted by the Rule, without taking into account the insurance commissions paid to the dealer by an independent insurance company.

Appellant asserts here that such differentiation in treatment of finance companies is of a character which results in a denial to appellant of equal protection.

The Questions Are Substantial

1. *The Standard to be Applied.* We do not expect this Court to hold that because Wisconsin "has prohibited some practices within its power to prohibit, it must prohibit all within its power", *United States* v. *Petrillo*, 332 U. S. 1, 8, 91 L. Ed. 1877, 1883 (1947). That is not this Court's province, as it has repeated in varying forms in numerous opinions. But this does not alter the rule that there must be some rational basis for regulating one person "that would not require with equal force its extension to others * * *." *Barrett* v. *Indiana*, 229 U. S. 26, 30, 57 L. Ed. 1050, 1053 (1913), and cases there cited. Without the latter rule, the equal protection clause would mean nothing, and in each of the cases in which this Court has warned that Congress or a legislature need not prevent all the evil within its power, this qualification has, in fact, been clearly expressed or implied.

The "rational basis" for the failure to extend the regulation to others has, of course, taken varying forms. Familiar examples are the administrative or other difficulties present in extending regulation to all within a class, *United States* v. *Carolene Products Co.*, 304 U. S. 144, 154, 82 L. Ed. 1234, 1243 (1938); *Railway Express Agency* v. *New York*, 336 U. S. 106, 93 L. Ed. 533 (1949); compare *Capitol Greyhound Lines* v. *Brice*, 339 U. S. 542, 94 L. Ed. 1053 (1950); the fact that the one regulated is a more conspicuous example of the evil, *Central Lumber Co.* v. *South Dakota*, 226 U. S. 157, 160-161, 57 L. Ed. 164, 169 (1912); see *United States* v. *Petrillo, supra;* the cautious, step-by-step advance which a legislative body may wish to undertake, *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U. S. 1, 46, 81 L. Ed. 893, 917 (1937); the fact that factors balancing the evil may be at work in a section of the class left unregulated, *Goesaert*

v. *Cleary*, 335 U. S. 464, 466, 93 L. Ed. 163, 166 (1948); or simply that the legislature may have believed that the evil was worse in one case than it was in another. *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 400, 81 L. Ed. 703, 713 (1937); *Minnesota ex rel. Pearson* v. *Probate Court*, 309 U. S. 270, 275, 84 L. Ed. 744, 750 (1940). It suffices to say that some practical or logical reason for the failure to extend the regulation to others has been present in each case in which a statute has been upheld.

Another qualification must be noted. The legislative discrimination must bear some reasonable relation to an object sought to be accomplished by the statute in question. A great many cases support this principle, as Mr. Justice Jackson noted in his concurring opinion in *Railway Express Agency* v. *New York, supra*, 336 U.S. at 111, 115. See, for example, *Kotch* v. *River Port Pilot Commissioners*, 330 U.S. 552, 556, 91 L. ed. 1093, 1097 (1947); *Atchison, Topeka & S.F.R. Co.* v. *Vosburg*, 283 U.S. 56, 59 L. ed. 1199 (1915); *Smith* v. *Cahoon*, 283 U.S. 553, 75 L. ed. 1264 (1931); *Bayside Fish Flour Co.* v. *Gentry*, 297 U.S. 422, 429, 80 L. ed. 772, 777 (1936). See Brandeis and Holmes, JJ., dissenting in *Quaker City Cab Co.* v. *Pennsylvania*, 277 U.S. 389, 403 at 406, 72 L. ed. 927, 931 at 932 (1928).

The question to be answered by this Court, then, is whether Wisconsin's attempt to treat dealer participation differently in the case of finance companies with closely affiliated insurance companies than in the case of finance companies which are not, bears any reasonable relation to the objects of regulating dealer participation.

2. *The Reason Dealer Participation Was Regulated.* In 1934 the "Wisconsin State Banking Commission and Interim Advisory Legislative Committee To Investigate Finance Companies" made an exhaustive study of the finance business. The report of this joint committee (Exhibit 53

in the present record) is the basis for the legislature's adoption of Section 218.01. There was extensive discussion of dealer participation, and its abuse, the "pack", noted above. There is nothing in that report either to indicate that the limitations upon some finance companies and not others would remedy any abuse or to indicate the slightest basis, rational or irrational, for any differentiation, as between finance companies. The evil which the committee saw in excessive dealer participation was not in *who* paid the dealer but rather in how much was paid. The following quotation from the report as to conditions prevailing in 1935, before the legislation, is illustrative (p. 35):

> "Keen competition then developed between *all finance companies, whether independent or nationals,* to secure the dealer's business. The result has been to enhance the evils of reserves, rebates and packs. Today, when a dealer makes arrangements to finance his paper, his first question is, 'How much do I get and when do I get it?'
>
> "In regard to reserves, rebates and packs, the Committee is of the opinion that the business has developed along this line where the proverbial slogan is in order: 'Everyone for himself and the Devil take the hindmost.' Inasmuch as the reserve, rebate, or pack must necessarily be paid by the consumer it logically follows that he is the 'hindmost'.
>
> "The Committee finds that quite often rebates are concealed in reserve allowances, and while excessive dealer's reserve is set up and paid as such, a portion of the said amount is in reality a rebate." (Our emphasis)[8]

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[8] The Committee's ultimate conclusions may be gleaned from the following quotation in the same report, pp. 58-60:

> "• • • Charges and rates should be as low as possible to the consumer, but high enough to attract capital into the field. If abuses are eliminated, and consumer charges and interest rates are not concealed, competition between finance agencies will reduce charges and

The statute enacted pursuant to this report likewise can be the basis for no differentiation between GMAC and any other finance company. It regulates dealer participation as such—not how, when or by whom that participation is paid.

Finally, the Commissioner's Rule II contains no such classification or reason therefor. Rule II as written made it unlawful for *any* finance company to pay *or for a dealer to receive* dealer participation in excess of the amounts specified in the Rule.

The investigating committee, the legislature and the appellee have always recognized that the evil of excessive dealer participation is this and this only: that *dealers* charge retail purchasers exorbitant, hidden amounts which do not represent fair financing charges; and that these excessive amounts are repaid by finance companies to the *dealers* in order to obtain the dealers' time paper. Which finance company pays the dealer and how the moneys are paid is irrelevant. It is the dealer, not the finance company, who was the primary object of this regulation.[4]

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rates to the lowest possible point consistent with good business. • • •

"When carrying charges are clarified and insurance costs are separated therefrom, uniform systems of bookkeeping and reporting developed, oppressive collection methods done away with, and a basis of fact developed upon which a fair and equitable charge might be predicated, rate fixing might be practicable. Until this is done, it is the opinion of the Committee that open and competitive methods in this branch of financing will eliminate the necessity of rate fixing. • • •

"Therefore the Committee feels that the keen competition between automobile finance companies who are interested in time payment purchases will, when the public has full knowledge of all charges including reserves, rebates and 'packs', reduce installment credit rates and charges to the lowest possible point. • • •"

[4] It is ironic, to say the least, that GMAC, which, as the record shows, was in the vanguard in its refusal to cooperate with dealers who desired to resort to the "pack", should now be singled out for discrimination.

Yet the appellee's Rule is invalidated, in effect, by the Supreme Court of Wisconsin as it is applied to finance companies other than GMAC (or other finance companies with closely affiliated insurance companies). A dealer may now, by dealing with a finance company and an independent insurance company, obtain the full dealer participation allowed by the Rule without being deprived of the right to receive insurance commissions. It is obvious that such a choice for the dealer makes the classification sanctioned by the Wisconsin Court a meaningless one, entirely inconsistent with the purpose of the regulation of dealer participation.

Even if GMAC were larger than its competitors in Wisconsin, and even if there were an attempt on GMAC's part to monopolize the industry—facts which do not appear of record and are not issues in this proceeding—this would be a case in which "size is not an index to an admitted evil" and hence "the law cannot discriminate between the great and small". Mr. Justice Holmes, for the Court, in *Engel* v. *O'Malley*, 219 U.S. 128, 138, 55 L. ed. 128, 136 (1911). See *Cotting* v. *Godard*, 183 U.S. 79, 46 L. ed. 92 (1901). Further, the close relationship between GMAC, MIC and GM cannot justify the discrimination against GMAC. There is nothing necessarily sinister in "interlocking directorates", or stock ownership of one corporation by another. General Motors is hardly in the position of those public utility holding companies who, because of their deception of the public as to the beneficial ownership of local utilities and consequent ability to over-reach the investor and his local utility, were subjected to regulation by the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79. See particularly § 79a (b). In the case of GMAC, there has never been any attempt to conceal its corporate ties. The very names of the three corporations suggest their relationship and the record is studded with instances of the advertisement of the "GM

Family". What is more important, the relationship of the corporations in the "GM Family" can have no rational bearing upon any regulation of dealer participation, as demonstrated above.

In short, there is neither a practical nor logical reason for Wisconsin's limiting its regulation of insurance commissions as dealer participation to finance companies closely affiliated with insurance companies nor is there any relation between regulation of dealer participation and GMAC's ownership of MIC.

Conclusion

This Court has jurisdiction on appeal. In view of the growing regulation in this field, the issue is of public importance. Statutes have been passed at least in Ohio, Indiana, Michigan, Massachusetts and Maryland, as well as Wisconsin. Substantial questions regarding the propriety of Wisconsin's classification of finance companies in relation to its regulation of dealer participation are presented under the equal protection clause of the Fourteenth Amendment. This Court should note jurisdiction.

Respectfully submitted,

ADOLPH I. MANDELKER,
Attorney for Appellant.

By: JACKSON M. BRUCE,
Of Counsel.

JACKSON M. BRUCE,
ANTHONY J. RUSSO,
Of Counsel.

Dated: April 27, 1951.

APPENDIX "A"

OPINION OF THE SUPREME COURT OF WISCONSIN RENDERED DECEMBER 5, 1950

STATE OF WISCONSIN: IN SUPREME COURT

August Term, 1950

No. 16

GENERAL MOTORS ACCEPTANCE CORPORATION, *Appellant*,

v.

COMMISSIONER OF BANKS, Formerly Designated as Banking Commission, *Respondent*

Appeal from a judgment of the circuit court for Dane County: Herman W. Sachtjen, Circuit Judge. *Affirmed.*

Proceeding by petition to the circuit court for Dane county under sec. 227.05 (1) Stats. for a determination by declaratory judgment that Rule II A of the Banking Commission (now Commissioner of Banks) is invalid. Judgment, which was entered March 1, 1950, determined that the rule is in all respects valid and constitutional; that it is not in excess of the statutory authority or jurisdiction of the Banking Commission or its successor, the Commissioner of Banks; and that said rule is not arbitrary or capricious or without basis in fact, all contrary to the allegations in said petition. Petitioner appeals from the whole of said judgment. The material facts will be stated in the opinion.

BROADFOOT, J. The findings of fact made by the trial court are a brief statement of the facts herein, and are as follows:

"1. That at all times material petitioner General Motors Acceptance Corporation, hereinafter referred to as GMAC was and is a foreign corporation duly licensed to do business in the state of Wisconsin with its offices at 606 W. Wisconsin Avenue, Milwaukee, Wisconsin. That at all times mentioned herein all the capital stock of GMAC with ex-

ception of directors' qualifying shares, was and is owned by General Motors Corporation.

"2. That G. M. Matthews, who resides in the city of Madison, Wisconsin, is the duly appointed, qualified and acting Commissioner of Banks of the state of Wisconsin.

"3. That continuously since 1936, GMAC has been and now is licensed in Wisconsin as a sales finance company and is engaged in the business of purchasing conditional sales contracts from automobile dealers holding franchises with General Motors Corporation.

"4. That GMAC purchases the conditional sales contract, signed by said automobile dealer, from the General Motors dealer, at a discount. In arriving at the total price to a retail buyer under such installment contract, the dealer adds to the cash sale price a finance charge and also a charge for the cost of insurance, if there be any. For that purpose the dealer consults a rate chart furnished by GMAC and such chart is on file with the Banking Commission. The finance charge has been designated and is known as the 'time price differential.'

"5. That for the past 25 years there has been active competition among finance companies for the privilege of purchasing both the contracts from General Motors dealers as well as other dealers who sell installment contracts.

"6. That originally GMAC purchased said conditional sales contracts from said General Motors dealers with recourse and such dealers were required to make good to GMAC for any losses sustained in the event the automobile buyer failed to make payments called for by the contract.

"7. That during this time other finance companies were established and competed for the privilege of buying conditional sales contracts both from General Motors dealers and other automobile dealers but upon a non-recourse basis, and such companies were known as 'non-recourse companies.'

"8. That to meet this competition the recourse companies, of which GMAC was one, established a practice of setting aside a part of the time price differential which at stated periods were remitted back to the automobile dealer to reimburse him for any losses he may have sustained by reason

of their dealing on a recourse basis; that such part of the time price differential set aside for the dealer was known as the reserve, or 'dealer's reserve' or 'dealer's participation.'

"9. That for many years prior to 1935 the amount so remitted covered more than the losses incurred by such automobile dealers and became a source of profit to them. Shrewd automobile dealers began to shop around and place their business with the finance company that gave them the largest reserve out of a given installment contract. Because of the keen competition between finance companies, certain abuses grew or developed in trying to obtain these contracts from dealers. These abuses were known as 'packs' and 'rebates' and became an excessive and a hidden expense to the automobile buyer.

"10. That the 1933 legislature, by resolution, authorized an investigation of finance companies and pursuant to such resolution the Banking Commission and an Interim Advisory Legislative Committee conducted such an investigation; that they submitted a report to the legislature of 1935 wherein they found that in many cases there were evils of excessive reserves which in reality were 'packs' and 'rebates.'

"11. That as a result of said report, the 1935 legislature enacted Section 218.01; that one of the primary purposes of such enactment was to regulate these finance companies so as to protect the automobile buyer from the evils of 'packs', 'rebates,' and 'excessive reserves.'

"12. That by later enactments to Section 218.01 there was delegated to the Banking Commission the authority to make rules and regulations which would promote the interests of retail buyers of motor vehicles and also gave to the Banking Commissioner the power to define unfair practices in the industry.

"13. That pursuant to such statutory enactment the Banking Commissioner promulgated rules and regulations, one of which purports to regulate 'dealer's reserve' or 'dealer's participation,' and is the rule that is the subject of this litigation. The provisions of the rule that are under attack read as follows:

"'Rule II. Dealer Participation.

"'A. "Dealer Participation" is defined as that portion of the charge contained in the rate charts on file with the Banking Department which is retained by or remitted or credited to the dealer by the finance company and shall also include any benefit from or part of any amount collected from any retail purchaser as a finance or insurance charge, which shall come to or be retained by a motor vehicle dealer on the sale or transfer, by such dealer, or a retail instalment contract of a motor vehicle.

• • •

"'D. Unreasonable Dealer Participation.

"'1. Any unreasonable or unconscionable dealer participation is hereby declared to be an unfair trade practice. Furthermore, any dealer participation in excess of the following is declared an unfair trade practice and unconscionable.

"'a. Two per cent per annum for a period not to exceed eighteen months of the unpaid balance on any retail instalment contract of a new motor vehicle. A minimum participation of $8.00 may be given and a maximum participation not to exceed $20.00.

"'b. Three per cent per annum for a period not to exceed eighteen months of the unpaid balance of any retail instalment contract of a used motor vehicle, the model of which is not over two years old. A minimum participation of $8.00 may be given, and a maximum participation of not to exceed $20.00.

"'c. Five per cent per annum for a period not to exceed eighteen months of the unpaid balance of any retail instalment contract of a used motor vehicle, the model of which is over two years old. A minimum participation of $8.00 may be given, and a maximum participation of not to exceed $20.00.'

"14. That since August 1, 1925 GMAC has had many finance plans in effect and since that time has required that insurance in some form be provided all at the expense of the automobile buyer; that through its advertising, both to

its dealers and to the public, it has always treated and considered insurance as an integral part of the cost of financing.

"15. That since August 1, 1925 up to the middle of 1945 the insurance provided for by the GMAC plan was written by General Exchange Insurance Corporation, hereinafter referred to as GEIC. Originally the majority of stock of GEIC was owned by GMAC but since the end of 1935 GEIC has become and is a wholly owned subsidiary of General Motors Corporation. The insurance written by GEIC was at 25 per cent less than manual rates and written as a part of the GMAC installment plan; this saving was passed on to the automobile buyer.

"16. That during the summer of 1941 Motors Insurance Corporation, hereinafter referred to as MIC, was incorporated. It is a wholly owned subsidiary of GMAC and is engaged in the writing of insurance required by GMAC on all vehicles sold on its time sales plan. MIC is licensed in this state to transact insurance business and the rates charged by it are standard or manual rates, the same as charged by stock companies for like coverages. MIC appoints as its agents the automobile dealers who hold franchises from General Motors Corporation and it pays such agent a commission of 25% of the premium so charged. GMAC on all insurance so written collects the insurance premiums from the retail buyers and remits the same periodically to MIC. MIC remits the insurance commissions to the dealer as allowed by Rule II.

"17. That MIC was incorporated in 1941 after the promulgation of Rule II; immediately a dispute arose between the Banking Commission and GMAC as to whether the insurance commissions paid by MIC to the dealers should be included as part of the 'dealer participation.' The Banking Commission determined that such insurance commissions should be included as part of "dealer participation' and since December 1941 GMAC has reluctantly complied with the rule.

"18. That GMAC suffers no monetary injury from Rule II as presently applied and has no legally protectible interest involved in the present controversy."

The appellant takes no issue with the findings of fact but does challenge the conclusions of law. In its brief the appellant states the basic issue as follows:

"In view of the situation, the basic issue in this case narrows down to the question whether insurance commissions received by the dealer from an insurance company, under the circumstances involved in this proceeding, constitute dealer participation within the proper meaning and scope of that term. GMAC contends that they do not, and that the defendant is not empowered to enlarge or extend the concept and meaning of dealer participation by subjecting the insurance commissions to the defendant's regulatory power over dealer participation. If GMAC's position on that basic question is correct, it follows that the defendant, by construing and applying the definition of dealer participation so as to bring the insurance commissions under its regulation of dealer participation, has unlawfully asserted regulatory power over something which is not dealer participation."

In its memorandum opinion the trial court summarized the argument of the appellant as follows:

"When the dealer is authorized by the buyer to procure the insurance from MIC, and he sells the installment contract to the petitioner, he acts in two capacities; namely, (1) as a seller of the installment contract to the petitioner, and (2) as a licensed insurance agent of MIC. The only benefit that accrues and is received by the dealer from the petitioner is the reserve with which he is credited and which he receives in connection with each installment sales contract. Petitioner has no objection to the defendant fixing minimum and maximum amounts for this participation. The insurance commission which the dealer receives, while a benefit to him, is received in a different capacity and for a different service performed by him than the seller of a sales contract. He receives the insurance from MIC, a separate corporate entity, as its licensed agent for procuring the insurance. The commission paid by MIC to such dealer is the same compensation for the same service and function for which some other insurance company would compensate its agent

if the retail buyer had purchased the insurance elsewhere. It is no benefit received from petitioner as a licensed sales finance company. The scope of dealer's participation must be measured by whatever benefit the dealer received from the petitioner."

The appellant made other arguments in detail to support its position. Each of its arguments is based upon the premise that appellant and its wholly-owned subsidiary, Motors Insurance Corporation, are separate entities. If that premise is correct, its arguments have weight and are convincing. If the premise is wrong, then the opposite is true.

The record reveals many instances of the close association of GMC, GMAC, and MIC: (1) MIC is a wholly-owned subsidiary of GMAC; (2) MIC does not write complete automobile coverage but only writes insurance against fire, theft and accidental physical damage to the car (including deductible collision). It writes only the insurance required by GMAC on vehicles sold on its time sales plan; (3) no separate application for insurance is made to MIC. To write the insurance MIC obtains from GMAC its dealer's work sheet which contains the necessary information; (4) GMAC advertises the insurance as part of a "one package plan." It advertises to dealers as follows:

"The value of the plan to the dealer is apparent from the following comparison of the profit potential of two sales:

"GMAC Plan	Bank Financing
"Car Sale	Car Sale
"Insurance Commissions	
"Dealer Reserve	
"Shop Volume from Insurance Losses	
"Insurance Renewals	
"Close customer relation	
"a) Service sales	
"b) Repeat car sales"	

It advertises to the public as follows:

"Here's why we use the
"General Motors Instalment Plan

"Operated by G.M.A.C.
"Because you get——

"1. Low cost
"2. Broad insurance protection
"3. Convenient 'One Package' transaction
"4. Flexibility—liberal treatment
"5. Local plus nation-wide facilities
"6. Budget plans for accessories and repairs
"7. Friendly, courteous service

"A complete and exclusive service for General Motors Customers."

(5) In the various documents used in the GMAC plan the insurance charges are referred to as "territorial charges." In one rate chart, Exhibit No. 42, the dealer is instructed to "consult GMAC branch for territory charge in all transactions involving tractors, trailers, semi-trailers and cars equipped to haul trailers." On another page of the same exhibit, dealers are referred to the GMAC branch for territory charge on used cars, rather than to MIC.

There are other factual situations reflected in the record which indicate the GMAC and MIC are separate corporations in name only. In legal language each corporation is considered as a separate entity. Separate corporations with common stock ownership, however, should not be treated as separate entities if reasonable regulation is hampered thereby.

> "Where the corporate form of organization is adopted or a corporate entity is asserted in an endeavor to evade a statute or to modify its intent, courts will disregard the corporation or its entity and look at the substance and reality of the matter. This has been applied to violations of laws against 'trusts' and combinations in restraint of trade and commerce, laws regulating public utilities, laws against rebating and overcharges, tax laws, and a workmen's compensation law. The courts will, conversely, refuse to regard corporations as the same in favor of one which seeks

thereby to evade law or legal obligations." 1 Fletcher Cyclopedia, Corporations, (Perm. ed.) p. 170, sec. 45.

See also *Milwaukee Toy Company* v. *Industrial Commission*, 203 Wis. 493, 234 N.W. 748; *Minahan* v. *Timm*, 210 Wis. 689, 247 N.W. 321; *Palmolive Co.* v. *Conway*, 43 F. (2d) 226; *United States* v. *Milwaukee Refrigerator Transit Co.*, 142 F. 247.

The separate corporate entity of MIC is asserted for the purpose of paying car dealers added "dealer participation" indirectly under the guise of insurance commissions. In view of the above authorities a piercing of the corporate veil shows that in substance GMAC and MIC are only separate names for the same persons and that the respondent is correct in his position.

By the Court.—Judgment affirmed.

APPENDIX "B"

OPINION OF THE SUPREME COURT OF WISCONSIN.

Rendered February 6, 1951

No. 16

August Term, 1950

STATE OF WISCONSIN: IN SUPREME COURT.

General Motors Acceptance Corporation, *Appellant*,

v.

Commissioner of Banks, formerly designated as Banking Commission, *Respondent*.

Broadfoot, J. (on motion for re-hearing). Upon the motion for rehearing, the petitioner, General Motors Acceptance Corporation, states that, in its decision herein, the court made no reference to a constitutional question raised

upon the appeal. The petitioner contended then, and does now upon this motion, that the ruling of the Commissioner of Banks and the decision of this court result in a denial to petitioner of the equal protection of the laws and a deprivation of its property without due process of law, each of which is guaranteed by the Fourteenth Amendment to the Constitution of the United States. Although it was specifically referred to in the opinion, the court considered this contention and deemed it to be without merit.

By the Court.—Motion for rehearing denied with $25.00 costs.

APPENDIX "C"

Rule II of the Commissioner of Banks of Wisconsin

Rule II Dealer Participation

A. "Dealer Participation" is defined as that portion of the charge contained in the rate charts on file with the Commission which is retained by or remitted or credited to the dealer by the finance company and shall also include any benefit from or part of any amount collected from any retail purchaser as a finance or insurance charge, which shall come to or be retained by a motor vehicle dealer on the sale or transfer, by such dealer, of a retail instalment contract of a motor vehicle.

B. No licensee shall create or be a party to creating, or accept, a dealer participation predicated upon any time sales transaction for the unpaid purchase price of an automobile which shall be unconscionable.

C. No finance company shall give or enter into any arrangement or transaction, or have any understanding with an automobile dealer to give a dealer participation which is unconscionable. A finance company may accept irregular or special deals to fit the peculiar needs of a purchaser, but no finance company in such irregular or special deals shall permit a larger dealer participation than is usual and customary in deals conforming to its filed rate charts.

D. Unreasonable Dealer Participation.

1. Any unreasonable or unconscionable dealer participation is hereby declared to be an unfair trade practice. Furthermore, any dealer participation in excess of the following is declared an unfair trade practice and unconscionable:

a. Two per cent per annum for a period not to exceed eighteen months of the unpaid balance on any retail instalment contract of a new motor vehicle. A minimum participation of $8.00 may be given and a maximum participation not to exceed $20.00.

b. Three per cent per annum for a period not to exceed eighteen months of the unpaid balance on any retail instalment contract of a used motor vehicle, the model of which is not over two years old. A minimum participation of $8.00 may be given, and a maximum participation of not to exceed $20.00.

c. Five per cent per annum for a period not to exceed eighteen months of the unpaid balance on any retail instalment contract of a used motor vehicle, the model of which is over two years old. A minimum participation of $8.00 may be given, and a maximum participation of not to exceed $20.00. (A motor vehicle shall be considered over two years old when the year model of that car is older than the current year model and the two next preceding year models. For example: After the 1942 models were introduced, 1939 year models and all models previous thereto became more than two years old.)

The foregoing dealer participation is allowed by the Commission as a sufficient and adequate sum to compensate reasonably prudent motor vehicle dealers for losses incurred by them on motor vehicles sold on the instalment plan until such a time as a survey can be made for final determination on this phase of the industry.

2. Whenever any sales finance company shall, directly or indirectly, or by any subterfuge, grant, allow, or credit, or agree to grant, allow or credit to any person or persons, except bona fide employes of the sales finance company, any participation in any finance charge which shall total in

excess of the percentages set forth above, it shall within five days after allowing, granting, or crediting such participation, mail to the purchaser of the financed motor vehicle, the notification set forth in subsection D 4 of Rule II, specifying therein the names of all persons who received participation and the amount of participation paid or credited each, and specifying further whether or not, to the best knowledge, information and belief of the finance company, such participation or part thereof inured directly or indirectly to the benefit of the dealer or the salesman who sold the financed car.

3. Rule 2 above shall apply to any sales finance company which shall rediscount instalment sales contracts for a motor vehicle dealer who is licensed as a sales finance company, or for a sales finance company, 25% or more of whose stock is owned in the aggregate by such dealer or his stockholders or his or their families.

4. Notice to the purchaser by the finance company.

IMPORTANT NOTICE

By order of the Banking Commission of Wisconsin you are hereby notified that so large a part of the finance charge you are paying on the ..... automobile you purchased on or about ..... from ..... has been, or will be paid over by the finance company to the persons shown below, that the Banking Commission of Wisconsin considers it an unfair trade practice; and, therefore, requires your finance company to send you this notice.

Your finance charge has been or will be divided as follows:

Apparently kept by your dealer	$.....
Apparently kept by	$.....
Apparently kept by	$.....
Manual insurance premium	$.....
Kept by the undersigned	$.....
Total charge	$.....

We are informed and believe that $..... of said charge will, directly or indirectly, inure to the benefit of

your dealer, and $..... to the salesman who sold you your car.

Dated ....., 19..

If you desire to communicate with the Banking Commission, address your communication to: Division of Consumer Credit, State Banking Department, Madison, Wisconsin.

....,

.....

This form must be approved by the Commission as to size and style of type and manner of make-up before being used.

5. Any sales finance company which shall pay any salaries or bonuses or make any gifts of money or merchandise to any motor vehicle dealer or motor vehicle salesman, directly or indirectly, or to any person or persons for them, other than usual and customary gifts on festive occasions, and any motor vehicle dealer or motor vehicle salesman who shall accept or receive any such salaries, bonuses, or gifts shall report such salaries, bonuses or gifts to the Banking Commission within five days after the same are made; and if the Commission, after a hearing, shall find that such gifts, salaries, or bonuses constitute a circumvention of the foregoing rule, it shall immediately suspend the license of the salesman, dealer and finance company involved, for a period of at least thirty days, and it shall enforce such other penalties as the facts shall warrant and the law permit.

6. Any motor vehicle dealer who shall directly or indirectly, or by any subterfuge, accept, take, or obtain, or agree so to accept, take, or obtain, in any manner or by any device either in cash or in credit or otherwise, any dealer participation which is unreasonable or unconscionable, or which exceeds the aforesaid percentage limitations, shall mail to the purchaser under the instalment sales contract in question the notice set forth in sub-section D 7 hereof, within five days after accepting, taking, or obtaining such participation, or agreeing so to do.

7. Notice to the purchaser by the motor vehicle dealer.

IMPORTANT NOTICE

To ....., by order of the Banking Commission of Wisconsin you are hereby notified that the undersigned who sold you a ..... car under instalment sales contract on the .... day of ....., 19.., has, or will, receive from the ..... finance company so large a part of the carrying charge provided for in the instalment contract, that the Banking Commission of Wisconsin consider it an unfair trade practice and, therefore, require the undersigned to send you this notice.

Your finance charge has been or will be divided as follows:

Retained by your undersigned dealer	$.....
Retained by the finance company and for insurance	$.....
Total finance charge	$.....

If you desire to communicate with the Banking Commission, address your communication to: Division of Consumer Credit, State Banking Department, Madison, Wisconsin.

Dated ....., 19....

.....

.....

This form must be approved by the Commission as to size and style of type and manner of make-up, before being used.

8. Whenever a sales finance company or motor vehicle dealer is required by any of the foregoing rules to mail either the notice provided for in D4 or D7, such finance company or dealer shall at the same time mail a copy of said notice to the Banking Commission of Wisconsin, with an affidavit by one of its officers that such notice is a true and correct copy of the notice mailed the purchaser, and also stating the date of such mailing.

9. No sales finance company shall, directly or indirectly, give or contract to give, to any motor vehicle salesman, and no motor vehicle salesman shall, directly or indirectly, take or obtain, or agree to take or obtain, any sum of money or anything of value, either directly or indirectly, or by any

subterfuge, as a consideration, inducement, or reward, for the receipt of any instalment contract or contracts by such finance company through the influence or effort or pretended influence or effort, of such salesman. The violation of this rule is declared to be an unfair trade practice, and any finance company or salesman who shall be guilty of such unfair trade practice shall immediately make full and complete disclosure of such unfair trade practice by mailing to the purchaser of the car under the instalment contract on which was the basis of the reward, the notice set forth in D10 within the five days after such reward shall be paid or agreed to be paid, and shall at the same time mail a copy of said notice to the Banking Commission of Wisconsin with an affidavit that such notice had been mailed to the purchaser.

10. Notice to the purchaser by the finance company.

IMPORTANT NOTICE

To ....., by order of the Banking Commission of Wisconsin you are hereby notified that when the ..... automobile which you purchased from ....., automobile company, was financed by the ....., finance company, the said finance company paid or agreed to pay ....., the salesman who sold said car, a reward of $..... This sum is in addition to the compensation paid said salesman by the dealer above named. Under the rules and regulations of the Wisconsin State Banking Department this is an unfair trade practice and the salesman receiving such reward and the finance company granting such reward are required to notify you thereof.

If you desire to communicate with the Banking Commission, address your communication to: Division of Consumer Credit, State Banking Department, Madison, Wisconsin.

Dated ....., 19....

.....

.....

This form must be approved by the Commission as to size and style of type and manner of make-up before being used.

E. In the event of prepayment of an instalment contract, on which a rebate for prepayment is allowed by the finance company, it shall be defined as an unfair trade practice for the retail seller to fail to refund to the finance company a proportion of the finance charge which was paid to him or credited to his account as dealer participation, or for the finance company to fail to require the retail seller to refund to the finance company the unearned portion of the dealer participation, except if said unearned portion is less than $1.00; the proportion to be determined by the use of the sum of the digits method based on the number of monthly payments for which the contract was originally written and the number of months the contract was actually in force.

FILED
MAY 21 1951
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 746

GENERAL MOTORS ACCEPTANCE CORPORATION,
Appellant,

vs.

COMMISSIONER OF BANKS OF THE STATE OF WISCONSIN

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

STATEMENT OPPOSING JURISDICTION

VERNON W. THOMSON,
Attorney General;
ROY G. TULANE,
Assistant Attorney General,
Counsel for Appellee.

WILLIAM E. TORKELSON,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 746

GENERAL MOTORS ACCEPTANCE CORPORATION,
Appellant,

vs.

COMMISSIONER OF BANKS OF THE STATE OF WISCONSIN,
Respondent

STATEMENT OPPOSING JURISDICTION

APPEAL FROM THE SUPREME COURT OF THE STATE OF WISCONSIN

Pursuant to paragraph 3 of Rule 12 of the Rules of the Supreme Court of the United States, the Attorney General of the State of Wisconsin files this statement opposing jurisdiction.

Nature of the Case

This is an appeal by General Motors Acceptance Corporation from a judgment of the Supreme Court of the State of Wisconsin entered on December 5, 1950 reported in 258 Wis. 56, 45 N. W. 2d 83 (195) and in respect to which

a rehearing was denied on February 6, 1951 as reported in 258 Wis. 64a, 46 N. W. 2d 328 (1951).

This judgment of the Supreme Court of the State of Wisconsin affirmed a judgment of the Circuit Court for Dane County, State of Wisconsin, which found and determined that Rule IIA of the Banking Commission of the State of Wisconsin (continued in effect as a rule of the Commissioner of Banks by ch. 411, Laws of Wisconsin, 1947) is in all respects valid and constitutional, within the statutory authority of the issuing agency and its successor, that said Rule IIA is not arbitrary or capricious or without basis and fact, and that said Rule IIA was properly construed and applied to include in "dealer participation" the insurance commissions received by a General Motors dealer who is also an agent of Motors Insurance Corporation.

Statement of Facts

The findings of fact of the trial court quoted with approval by the Supreme Court of Wisconsin in its opinion, Appendix A to appellant's statement, together with the references to the record in that opinion, present an excellent summary of all material facts necessary for an understanding of the issues presented herein.

We direct particular attention to finding 17, which reads: "that GMAC suffers no monetary injury from Rule II as presently applied and has no legally protectible interest involved in the present controversy"; to finding No. 15 which states that for some 20 years commencing August 1, 1925 insurance under the GMAC plan was furnished through the General Exchange Insurance Corporation without any charge for insurance commission; and to finding No. 17 which states that since December, 1941 GMAC has reluctantly complied with Rule II.

Further, in the memorandum decision of the trial court which under Wisconsin law may be considered the same as formal findings of fact, *United Parcel Service* v. *Public Service Commission* (1942), 240 Wis. 603, 607-8, 4 N. W. 2d 138, the court stated, "* * * the dealer agent does nothing to warrant additional compensation. * * *", and the record shows that the services in the so-called sale of an insurance policy for which GMAC proposes to pay its dealer some $10 to $20 or more consisted merely of making two check marks in the right places on the conditional sales contract.

Jurisdiction

Jurisdiction is opposed on the ground that no substantial federal question is involved.

I. Appellant Has Failed to Plead and Prove Any Facts to Substantiate Its Claim of Discrimination

Appellant bases its claim of jurisdiction on the ground that it has been denied the equal protection of the laws in that Rule II as construed by the Supreme Court of the State of Wisconsin discriminates unfairly between auto finance companies like GMAC, which have a wholly owned insurance company such as MIC, and other finance companies which are not closely affiliated with insurance companies.

Appellant's contention in this form was raised for the first time on motion for rehearing, in spite of the fact that respondent both in trial court and in the Supreme Court of the State of Wisconsin had strenuously urged the identity of GMAC and MIC as one of the principal grounds of the validity of its rule.

While we recognize the rule that a federal question may be raised for the first time on motion for rehearing in state court, we respectfully point out to the Court that an

issue not adverted to until that time will in most cases have no sufficient record to sustain it.

There is thus nothing in the record in this case to support Appellant's argument that Appellant is singled out as the sole object of Rule II of the Commissioner of Banks limiting dealer participation. There is nothing to show how the rule applies to or is enforced against others, whether dealers or finance companies, whether affiliated with insurers or independent of them.

The Wisconsin Supreme Court affirmed the judgment of the Circuit Court of Dane County and that judgment, as recited in the opening paragraph of the Wisconsin Supreme Court opinion, determined that the rule is in all respects valid and constitutional; that it is not in excess of the statutory authority or jurisdiction of the Banking Commission or its successor, the Commissioner of Banks; and that said rule is not arbitrary or capricious or without basis in fact, all contrary to the allegations of the petition. No application of the rule to any other finance company or dealer, affiliated with or independent of an insurance company, was in any way inhibited.

The only contention of unconstitutionality presented prior to the motion for rehearing was, not a claim of discrimination, but an assertion merely that the rule exceeded the rule making authority conferred by the statute. The contention in the GMAC brief in the Wisconsin Supreme Court was: "Since the Rule is in excess of the statutory power of the administrative agency, it follows that the enforcement of the Rule is a denial to the petitioner of due process of law under the Fourteenth Amendment to the Constitution of the United States."

The objections first raised on the motion for rehearing and asserted by Appellant to support jurisdiction—that by identifying it with its wholly owned insurance subsidiary

it becomes the only finance company subject to Rule II A, thus making the Rule discriminatory—assume many things not in the record. They assume there are no other finance companies with wholly owned or affiliated insurance companies. The record is to the contrary (R. p. 211). They assume that the Commissioner of Banks will not enforce the rule against others according to its terms, regardless of affiliation or independence of insurers. There is nothing in the record to suggest that application of the Rule will be limited.

Even if these new objections could be supported by reference to the record, which is not the case, the power of the State to ignore the interposition of the separate corporation MIC is unquestionable. *Anderson* v. *Abbott*, (1944), 321 U. S. 349, p. 363, 64 S. Ct. 531, p. 538, 88 L. Ed. 793. And, even if GMAC were alone affected by the Rule, that does not establish an unconstitutional classification. The statement of the Court in *Daniel* v. *Family Security Life Ins. Co.*, (1949) 336 U. S. 220, p. 225 n. 5, 69 S. Ct. 550, p. 553, may be applied as follows:

> "That respondent company [here Appellant GMAC] is the only concern now affected by the statute [Rule] does not, of course, mean a denial of equal protection. The statute [Rule] is drawn in general terms; the company's [GMAC's] success might well induce others to enter the business."

See also, *Mason* v. *Missouri*, 179 U. S. 328, 21 S. Ct. 125, 45 L. Ed. 214.

The rule is elementary that the party desiring to challenge the constitutionality of a statute must both plead and prove the facts necessary to overcome the presumption of constitutionality.

Appellant's entire argument up until its motion for rehearing consisted simply of the constant reiteration of the

theme that insurance commissions are not dealer participation.

At no time did it either plead or prove that there were no substantial differences of legal significance between corporations in the status of the GMAC-MIC combine and other auto finance companies which were in no way affiliated with an insurance company, and nowhere in its present statement in support of jurisdiction does it attempt to show that there is an identity of legal status between GMAC-MIC and other companies which appellant claims are not subject to regulation under its interpretation of the decision of the Supreme Court of Wisconsin.

There can be no dispute with the argument in appellant's statement (heading QUESTIONS ARE SUBSTANTIAL, para. 1) that there must be a rational basis for classification. But then, in para. 2, the only remaining argument in its statement, instead of pointing out where in its pleading and proof it has shown that it occupies a similar status to the finance companies which it contends are not regulated, appellant attempts to reexamine the effect and purpose of the Wisconsin Statute which is purely a question of internal law of the State of Wisconsin and which has been decided adversely to its contention by the Wisconsin courts.

Appellant's discussion of the purpose of the statute is misleading and utterly erroneous. Through three courts now it has been impossible to force GMAC to face up to the simple fact that a principal evil in the finance business resulted from the competition between finance companies to see which one could pay the biggest kickback to the dealer, however denominated, in order to get his business. It was this race between the finance companies to give larger and larger sums to the dealers to secure his business which increased the finance costs to the public and inspired the investigating committee to quote the slogan, Exhibit 53, p.

35, "Everyone for himself and the devil take the hindmost." It was the competition among the finance companies to outbid each other for the privilege of purchasing a dealer's paper which increased the finance charge which the consumer had to pay. The only logical way to prevent what in effect was an auction of the paper to the highest bidder was to place a limit upon the amount that could be paid to the dealer and that is what the State of Wisconsin did by its Rule and Statute.

The Wisconsin Legislature recognized that insurance of the finance vehicle is part of the financing. It expressly defined for its regulatory law, §218.01 *Wis. Stats., Subsection* (1) "(i) 'Finance charge' means that part of the total price in the retail instalment contract of sale in excess of the cash price, and includes, unless otherwise specified, the insurance premium, if any." *Rule II A* of the Commissioner of Banks regulating "dealer participation" thus properly included in that concept "any benefit from or part of any amount collected from any retail purchaser as a finance or *insurance* charge, which shall come to or be retained by a motor vehicle dealer" * * *. (Emphasis supplied.)

This is the Rule which was affirmed, and it is not limited in application to GMAC. The Wisconsin Supreme Court, however, found GMAC's subterfuge of creating its wholly owned insurance subsidiary an easy basis for rejection of its challenge of the Rule. The fact that the Wisconsin Supreme Court stressed that and found it sufficient for rejection of GMAC's challenge does not detract from the affirmance of the Circuit Court judgment which sustained the Rule in all respects and all applications within its scope.

The force of the Rule and Statute would be entirely destroyed if any finance company could invent some device whereby it was able to funnel more money into the dealer's pockets in return for his paper than the maximum allowed

by the Rule, and that is exactly what GMAC would be able to do through the device of its wholly owned insurance subsidiary MIC.

II. The Wisconsin Courts Have Found as a Fact That the So-called Insurance Commissions Were Nothing But Dealer Participation.

The Supreme Court of the State of Wisconsin after approving in toto the trial court's formal findings stated in its opinion, "The separate corporate entity of MIC is asserted for the purpose of paying car dealers added 'dealer participation' indirectly under the guise of insurance commissions."

While we will concede that a state court cannot defeat federal jurisdiction by a finding of fact which is contrary to the evidence, appellant has nowhere attempted in its statement as to jurisdiction to show that the statement above quoted is contrary to the evidence and it could not do so for the record seems abundantly clear that the so-called insurance commissions were not in fact earned.

Finding 15 of the trial court, approved in its opinion by the Supreme Court of Wisconsin, shows that for 20 years insurance was furnished without charge for commission. The trial court stated in its memorandum opinion, in discussing this subject that, "the dealer agent does nothing to warrant additional compensation." Finally, the record appears to be conclusive that the only services rendered by the dealer agent which would entitle him to the so-called insurance commissions were to make two check marks in the right places on the conditional sales contract, Exhibit 1 in this case.

Since appellant has not seen fit to attack this finding it would appear that it must be taken as a verity. Hence

when appellant concedes, as it appears to do under the hearing in its statement, "Wisconsin Legislation," that the state has power to regulate dealer participation, it would appear that appellant has conceded itself entirely out of court.

The finding of fact that insurance commissions received by the dealer are part of dealer participation in the financing is also sustained by evidence in the record of GMAC's published statements in advertising and in its Dealer's Manual. The insurance is advertised to the public by GMAC as included in the low cost "One Package" transaction in the dealer's poster (Exh. 8) as follows:

> "Here's why we use the General Motors Instalment Plan *Operated by GMAC*. because you get—
>
> 1. Low cost
> 2. *Broad insurance protection*
> 3. Convenient *'One Package'* transaction
> 4. Flexibility—liberal treatment
> 5. Local plus nation-wide facilities
> 6. Budget plans for accessories and repairs
> 7. Friendly, courteous service
>
> A complete and exclusive service for General Motors Customers" (Emphasis supplied.)

The benefit to or participation by the dealer is described in GMAC's Dealer Manual (Exh. 15, p. 35; with emphasis supplied) as follows:

> "The value of the plan to the dealer is apparent from the following comparison of the profit potential of two sales:
>
> | GMAC Plan | Bank Financing |
> | --- | --- |
> | Car sale | Car sale |
> | *Insurance Commission* | |
> | *Dealer Reserve* | |
> | Shop Volume from Insurance Losses | |
> | Insurance Renewals | |

Close Customer Relation
(a) Service Sales
(b) Repeat Car Sales"

Insurance commissions and dealer reserve are thus admittedly dealer participation under the GMAC Plan.

III. GMAC Suffers No Injury as the Result of the Application of Rule II and Therefore Has No Standing in Court.

GMAC has never been able or willing to explain just how it suffers legal injury as the result of the application of Rule II. The record in the state court is barren of any such explanation as is the present statement on jurisdiction.

Finding No. 18 of the trial court reads:

> "That GMAC suffered no monetary injury from Rule IIa or Rule II as presently applied and has no legally, protectible interest involved in the present controversy."

It is obvious that the effect of the Rule is to compel the finance company to retain a larger portion of the finance charge than it would were the Rule not in effect. An automobile dealer who is thereby deprived of the opportunity of selling his installment paper in a free market would suffer a monetary injury and would have a right to be heard, but for reasons best known to themselves GMAC did not join a dealer as party plaintiff in this action.

One cannot champion the rights of anyone other than himself.

Ashbury Hospital v. *Cass County*, (1943), 72 N. D. 359, 7 N. W. 2d 438;

Hannaford v. *Silas Mason Co.*, (1937) 300 U. S. 577.

A person desiring to attack the constitutionality of a statute must show that he is injured by its application.

Coffman v. *Breeze Corporation*, (1945) 323 U. S. 316, 65 S. Ct. 298, 89 L. ed 264;

Alabama State Federation of Labor v. *McAdory*, (1945) 325 U. S. 450, 65 S. Ct. 1384, 89 L. ed 1725.

The burden is on the person attacking the law to show that he is injured.

Stockholders of The Peoples Banking Co. of Smithsburg, Maryland v. *Sterling*, (1937) 300 U. S. 175, 57 S. Ct. 386, 81 L. ed 586.

This action was commenced as an action for declaratory judgment. A statute which attempted to authorize a court to render declaratory judgment in moot cases would be unconstitutional.

Aetna Life Insurance Company v. *Haworth*, (1937) 300 U. S. 227, 57 S. Ct. 461, 81 L. ed 617, 108 A. L. R. 1000;

15 Am. Jur., *Declaratory Judgment*, para. 5.

Appellant's theory is that the Rule which it challenges impairs its ability to purchase conditional sales contracts from General Motors dealers. The correctness of any such claim is not conceded, but in any event the appellant sustains no injury in the constitutional sense as a result. In this connection this court on April 23, 1951 said in *California State Auto Ass'n. Inter-Insurance Bureau* v. *Maloney*,——U. S.——, 71 S. Ct. 601, 604 as follows:

"• • • Appellant's business may of course be less prosperous as a result of the regulation. That diminution in value, however, has never mounted to the dig-

nity of a taking in the constitutional sense. See Noble State Bank v. Haskell, supra, 219 U. S. at page 110, 31 S. Ct. at page 187; Block v. Hirsh, 256 U. S. 135, 155, 41 S. Ct. 458, 459, 65 L. Ed. 865."

IV. GMAC Has Failed to Exhaust Its Administrative Remedy

While the Supreme Court of the State of Wisconsin did not find it necessary to pass on this point because of the clear ruling that it was possible to make on the merits of the case, the law of Wisconsin is well established as it is in the federal courts that a party that has failed to exhaust his administrative remedy will not be heard in court.

Corstvet v. *Bank of Deerfield,* (1936) 220 Wis. 209, 263 N. W. 687;

State ex rel. Attorney General v. *Fasekas,* (1937) 223 Wis. 356, 269 N. W. 700;

James Conroy Family Company v. *Milwaukee,* (1944) 246 Wis. 258, 16 N. W. 2d 814;

State ex rel. Attorney General v. *Noyes,* (1937) 223 Wis. 378, 269 N. W. 710.

Prior to 1947 under the provisions of sec. 220.035, Wis. Stats., all orders or rules of the Banking Commission were subject to review by the Banking Review Board. The banking functions of the Commissioner of Banks continued to be subject to such review after 1947 and his acts under ch. 218, Wis. Stats., are subject to review under sec. 220.037, Wis. Stats., by the Consumer Credit Review Board.

Rule II was originally promulgated by the Banking Commission of Wisconsin back in 1938. The findings of the trial

court as set forth herein show that GMAC reluctantly complied with the Rule for many years after 1941.

GMAC conceded that it had made no attempt at any time to secure a review of Rule II by the Banking Review Board or by its successor, the Consumer Credit Review Board.

The United States Supreme Court adheres to the Rule that administrative remedies must be exhausted.

Myers v. *Bethlehem Shipbuilding Corporation*, (1938) 303 U. S. 41, 58 S. Ct. 459, 82 L. ed 638;

Macauley v. *Waterman Steamship Company*, (1946) 327 U. S. 540, 66 S. Ct. 712, 70 L. ed 839.

Conclusion

We respectfully submit that there is no substantial federal question involved in this case and that this appeal is utterly lacking in merit.

The principle on which the Supreme Court of the State of Wisconsin grounded its decision, that is, that the courts may disregard the assertion of a separate corporate entity whenever necessary to prevent evasion of the statutes of their states, besides being clearly a matter of internal state law, has been reiterated in literally hundreds of decisions both in state courts and in the Supreme Court of the United States. It does not appear that a further statement of this principle would serve any useful purpose.

Appellant in its statement on jurisdiction concedes that a state may lawfully regulate dealer participation.

Appellant has made no effective challenge to the finding of the state courts that the sums under dispute herein were in fact dealer participation and as set forth above we respectfully suggest that no such challenge could be made.

We respectfully submit that jurisdiction should not be noted.

Respectfully submitted,

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By: WILLIAM E. TORKELSON
Of Counsel

OF COUNSEL:
WILLIAM E. TORKELSON

Dated this 10th day of May, A. D. 1951.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 746

GENERAL MOTORS ACCEPTANCE CORPORATION,
Appellant,

vs.

COMMISSIONER OF BANKS OF THE STATE OF WISCONSIN,
Appellee.

Appeal From the Supreme Court of Wisconsin

APPELLANT'S REPLY TO STATEMENT OPPOSING JURISDICTION

Pursuant to paragraph 3 of Rule 12 and paragraph 3 of Rule 7 of the Rules of the Supreme Court of the United States, appellant submits herewith its reply to appellee's statement opposing jurisdiction. See Stern and Gressman, *Supreme Court Practice* (1950), page 240.

JURISDICTION: REPLY

Appellee states that he challenges the jurisdiction of this court "on the ground that no substantial federal question is involved." Much of his argument, however, is devoted

to various procedural objections. Only three of these assertions merit the following brief reply:

1. *Raising the Federal Question.* We believe we have adequately demonstrated in paragraph numbered 2 of the JURISDICTION section of our Statement that the federal question is properly before this Court. While appellant immediately raised the constitutional invalidity of the Rule in its initial petition and at all points throughout this litigation maintained that the corporate relationship of GMAC and MIC were irrelevant, it was not until the Wisconsin Supreme Court rendered its decision that the precise constitutional question here presented was evolved. At that time, upon the petition for rehearing, the Wisconsin Court specifically ruled on the precise constitutional question now before this Court.

2. *Exhaustion of Administrative Remedy.* In Section IV of his Statement Opposing Jurisdiction appellee states that "the law of Wisconsin is well established as it is in the federal courts that a party that has failed to exhaust his administrative remedy will not be heard in court." But in Wisconsin, as elsewhere, the doctrine of exhaustion of administrative remedies is based upon the theory that the legislature would have wanted that doctrine to be applied. As the Supreme Court of Wisconsin recognized by passing on the merits of this case, the Wisconsin legislature has stated in the most unmistakable terms that that doctrine shall not apply in Wisconsin in a declaratory proceeding brought under Chapter 227, Wisconsin Statutes, the chapter under which the present proceeding was brought. Section 227.05 (2) provides that "A declaratory judgment may be rendered whether or not the petitioner has first requested the agency to pass upon the validity of the rule in question."

3. *GMAC's Legal Injury.* In contending that GMAC has no standing to raise the constitutional question in this Court, appellee ignores the fact that he has threatened to revoke appellant's license to do business in Wisconsin. By his silence we must assume that appellee would agree that the threat of revocation legally injures GMAC. Appellant clearly has standing to raise his constitutional questions in this Court. See paragraph numbered 3 in the JURISDICTION section of appellant's Statement.

The trial court in Wisconsin overlooked this point, but the Supreme Court of Wisconsin clearly gave short shrift to the Commissioner's argument — it passed upon the merits of the case.[1]

THE QUESTIONS ARE SUBSTANTIAL: REPLY

1. Appellee suggests that his view that insurance commissions are part of dealer participation may still be invoked against finance companies not affiliated with insurance companies. The Commissioner's conclusion is not supported by the Supreme Court of Wisconsin. Appellee overlooks the fact that Wisconsin's highest court stated that were it not for its conclusion that GMAC and MIC should be treated as one, GMAC's "convincing" argument that insurance commissions are not dealer participation would have been upheld, — that is to say, the trial court's judgment would have been reversed.

Even the Commissioner does not argue that this rationale of decision, deliberately adopted by the Wisconsin

[1] Legal injury is essential in Wisconsin before a court will declare the rights of the parties under Chapter 227, Wisconsin Statutes, *supra*. § 227.05 (1) provides in part: "The court shall hear the petition and render a declaratory judgment thereon only when it appears from the petition and evidence presented in support thereof that the rule, or its threatened application, interferes with or impairs, or threatens to interfere with or impair, the legal rights and privileges of the petitioner."

court, justifies regulation of finance companies other than those deemed one and the same as insurance companies. Appellee refers constantly to the fact that *his Rule* and the *judgment* of the *trial* court upholding the Rule were affirmed by the Wisconsin Supreme Court, but it is obvious that a judgment means only as much as the issuing court says it means. See, for example, *International Union, U. A. W., A. F. of L. v. Wisconsin Employment Relations Board*, 336 U.S. 245, 93 L. ed. 651 (1949); *Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board*, 315 U.S. 437, 86 L. ed. 946 (1942); compare *Clark v. Williard*, 292 U.S. 112, 78 L. ed. 1160 (1934), with the earlier doctrine of finality in *Bruce v. Tobin*, 245 U.S. 18, 62 L. ed. 123 (1917).

2. Appellee seems to argue that GMAC cannot point to pages in the record which show that it is in the same class as other finance companies not affected by the Wisconsin Supreme Court decision. The Commissioner apparently contends that this violates the rule that a person must show facts which substantiate his claim that a statute is unconstitutional. It is apparent, however, that the entire record in this cause justifies the assumption of both appellant and appellee from the beginning of this litigation nearly four years ago, that GMAC is like any other finance company except that it wholly owns a subsidiary insurance company — or, if you will, that GMAC and MIC are "separate corporations in name only." See for example, the testimony of John F. Doyle, supervisor of appellee's consumers' credit agencies, Tr. pp. 397-452.

It is apparent, further, from the opinion of the Supreme Court of Wisconsin, that it considered the corporate relationship between GMAC and MIC the *only* significant difference between GMAC and the other finance companies operating in Wisconsin.

If appellee is arguing that it is this difference — ownership of MIC — which makes GMAC different from other finance companies in Wisconsin, he is, of course, arguing the merits of appellant's equal protection claim. Facts supplied by the exhibits and testimony in the present record as well as by common knowledge, provide ample basis to pass upon that claim.

3. Appellee states that our summary of the purpose of the Wisconsin statute "is misleading and utterly erroneous." Despite this broadside, it is apparent from even a hasty comparison that there is little substantial difference between appellant's and appellee's discussion of the same subject. The parties agree that "the competition between finance companies to see which one could pay the biggest kickback to the dealer", to quote appellee, was a primary purpose of Rule II. Appellee does not challenge appellant's demonstration that such a legislative purpose has no relation to a distinction between a finance company deemed one and the same as an insurance company, on the one hand, and finance companies independent of insurance companies, on the other, when it comes to the question of whether insurance commissions are to be regulated as part of dealer participation.[2]

4. Appellee contends that there was a finding of fact below that insurance commissions are "nothing but dealer participation", and that this somehow forecloses appellant in this Court. A careful reading of section II of appellee's Statement Opposing Jurisdiction reveals an adroit

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[2] In stating that the purpose of the Wisconsin statute is solely a question of Wisconsin law, appellee ignores the well-settled principle that the legislature's discrimination must bear some reasonable relation to an object sought to be accomplished by the statute in question. See the many cases cited in appellant's Statement under the heading "THE QUESTIONS ARE SUBSTANTIAL", near the end of paragraph numbered 1.

attempt to establish a finding which was not in fact made. Aside from that, however, the argument will not stand analysis.

Appellee's assertion in this connection is, at most, another way of expressing the Wisconsin court's conclusion that GMAC and MIC are one and the same corporation. From that conclusion it follows necessarily that a payment of either insurance commissions or dealer participation by one of those corporations is also a payment by the other. GMAC has come to this Court because the result of this reasoning cannot be applied to finance companies affiliated with insurance companies and not to finance and insurance companies independent of each other, if Wisconsin is to escape the proscriptions of the Equal Protection Clause. As we demonstrated in our Statement, there is no logical or practical distinction, consistent with the purpose for which the statute and Rule II were adopted, which justifies Wisconsin's treatment of insurance commissions as dealer participation in the one case and treating them differently in the other. The public interest sought to be protected by the Rule is equally harmed, if harmed it is, by the one method of paying the dealer as by the other.

CONCLUSION

Appellee's arguments reinforce appellant's conclusions that this Court should note jurisdiction.

Respectfully submitted,

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May, 1951